

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION**

STATE OF SOUTH CAROLINA,)
)
Plaintiff,)
)
v.) Case No. _____
)
UNITED STATES DEPARTMENT OF)
ENERGY;)
)
DR. ERNEST MONIZ, in his official capacity as)
Secretary of Energy;)
)
NATIONAL NUCLEAR SECURITY)
ADMINISTRATION; and)
)
EDWARD BRUCE HELD, in his official)
capacity as Associate Deputy Secretary of)
Energy and Acting Administrator and Acting)
Undersecretary for Nuclear Security;)
)
Defendants.)
_____)

COMPLAINT

The State of South Carolina (South Carolina or State) sets forth and complains as follows:

INTRODUCTION

1. This matter arises out of agency action by the United States Department of Energy (DOE) and the National Nuclear Security Administration (NNSA) that will indefinitely suspend the mixed oxide fuel fabrication facility project (MOX Facility or Project) currently under construction at the Savannah River Site (SRS) in Aiken County, South Carolina.

2. In 2000, the United States and Russia entered into the Plutonium Management and Disposition Agreement (PMDA) whereby each nation agreed to dispose of no less than 34 metric tons of weapons-grade plutonium.

3. In furtherance of this agreement, DOE recommended the construction and operation of the MOX Facility at SRS. Consistent with DOE's recommendation, in 2002, Congress mandated the construction and operation of the MOX Facility. Following the design of the Project, Congress appropriated funds for the Project in Fiscal Year 2007 and construction on the MOX Facility began on or about August 1, 2007.

4. Since 2007, Congress has invested billions of dollars for the MOX Facility and, for the current fiscal year ending on September 30, 2014, Congress directed DOE and NNSA to spend over approximately \$343 million for continued construction of the Project. Currently, the MOX Facility is over 60% complete and employs approximately 1,800 persons residing in and around Aiken, South Carolina and surrounding communities.

5. In 2010, the United States and Russia amended the PMDA agreeing to begin plutonium disposition in 2018 and confirming that the MOX approach was the only option for plutonium disposition. The amended PMDA entered into force on July 13, 2011.

6. On or about March 4, 2014, the President released his Budget Proposal for Fiscal Year 2015 recommending that the MOX Facility be funded at a reduced level sufficient to place the Project into "cold standby." Although not specifically defined in the Budget Proposal, based on DOE's expressed intentions, "cold standby" is equivalent to an indefinite suspension of construction and the Project. Notwithstanding the absence of any change in current funding or Congressional authorization to suspend the Project, DOE and NNSA have announced their

intentions to accelerate the President's proposal and place the MOX Facility into immediate cold standby before the end of Fiscal Year 2014.

7. By taking steps to place the Project into cold standby prior to the conclusion of Fiscal Year 2014 and before finding any alternative disposal strategy, DOE and NNSA are acting in direct contravention of Congressional directive and instruction that the MOX Facility continue to be constructed, thereby violating the United States Constitution and Federal law.

PARTIES

8. South Carolina is a sovereign state of the United States and home to SRS, which borders the Savannah River and covers approximately 310 square miles, encompassing parts of Aiken, Barnwell, and Allendale counties. South Carolina also is the owner of property located within, nearby, and adjacent to SRS, including at least one road traversing the site, thereby making it susceptible to the "risk inherent in storing nuclear materials." Ex. 1, DOE, *Am. Interim Action Determination* 1 (Oct. 13, 2011). Congress has declared that "the State of South Carolina [has] a compelling interest in the safe, proper, and efficient operation of the plutonium disposition facilities at the Savannah River Site." Bob Stump National Defense Authorization Act for Fiscal Year 2003 (NDAA FY03), Pub. L. No. 107-314, 116 Stat. 2458, Subtitle E, § 3181. Furthermore, "the MOX facility will also be economically beneficial to the State of South Carolina, and that economic benefit will not be fully realized unless the MOX facility is built."

Id.

9. Defendant DOE is a federal agency responsible for, among other things, the administration of federal programs concerning the production of nuclear materials for the weapons program and their disposition. *See* 42 U.S.C.A. §§ 7111 *et seq.* DOE is the owner of SRS. Defendant Dr. Ernest Moniz is the United States Secretary of Energy (Secretary of Energy)

and is sued in his official capacity. The Secretary of Energy is responsible for the administration, operations, and activities of DOE, including the administration of programs related to the MOX Facility at SRS.

10. Defendant NNSA is a separately organized agency within the DOE created by Congress in 2000. 50 U.S.C.A. § 2401. NNSA generally is responsible for the nation's nuclear weapons, nonproliferation, and naval reactors programs, *id.*, and specifically administers and manages activities related to the MOX Facility. Defendant Edward Bruce Held is the Associate Deputy Secretary of Energy and the Acting Administrator and Acting Undersecretary for Nuclear Security (Administrator) and is sued in his official capacity. The Administrator is responsible for the administration, operations, and activities of NNSA, including programs related to the MOX Facility.

JURISDICTION

11. This action arises under Article I, section 1, Article I, section 9, and Article II, section 2 of the Constitution of the United States; the Atomic Energy Defense Provisions, 50 U.S.C.A. §§ 2501 *et seq.*; the Purpose Statute, 31 U.S.C.A. § 1301; the Anti-Deficiency Act, 31 U.S.C.A. § 1341 *et seq.*; the Federal Administrative Procedures Act, 5 U.S.C.A. §§ 701 *et seq.* (APA); multiple National Defense Authorization Acts (NDAAAs); and the Consolidated Appropriations Act, 2014, Pub. L. 113-76, 128 Stat. 5 (CAA FY14). This Court has jurisdiction over this matter pursuant to 28 U.S.C.A. § 1331 (federal question), 28 U.S.C.A. §§ 2201 and 2202 (declaratory and injunctive relief), and 5 U.S.C.A. §§ 702, 704, and 706.

VENUE

12. Venue is proper in this Court pursuant to 28 U.S.C.A. § 1391(b) and Local Civil Rule 3.01(A)(1), as the facility and property that is the subject of this action is within the boundaries of the State of South Carolina and Aiken County.

GOVERNING LAW

The United States Constitution

13. The Constitution provides that all “legislative Powers herein granted shall be vested in a Congress, which shall consist of a Senate and House of Representatives.” U.S. Const. art. I § 1.

14. The Appropriations Clause of the Constitution provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9, cl. 7.

15. The Constitution further provides that the “[t]he executive Power shall be vested in a President,” U.S. Const. art. II, § 1, and that “he shall take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 2.

The Administrative Procedure Act

16. The APA entitles a party suffering a legal wrong because of agency action, or adversely affected by agency action, the right to judicial review. 5 U.S.C.A. § 702.

17. The APA provides judicial review of final agency actions for which there is no other adequate remedy in a court. 5 U.S.C.A. § 704.

18. A reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, or in excess of

statutory jurisdiction or authority, or without observance of procedure required by law. 5 U.S.C.A. § 706.

Atomic Energy Defense Provisions

19. Section 2566 of the Atomic Energy Defense Provisions, entitled, “Disposition of Weapons-Usable Plutonium at Savannah River Site” sets forth the Congressional mandate for the “construction and operation of [the MOX Facility].” 50 U.S.C.A. § 2566(a). As set forth therein, DOE is required to achieve the “MOX production objective,” defined as the “production at the MOX facility of mixed-oxide fuel from defense plutonium and defense plutonium materials at an average rate equivalent to not less than one metric ton of mixed-oxide fuel per year.” 50 U.S.C.A. § 2566(a), (h).

20. Section 2566 also requires “a schedule of operations of the [MOX Facility] designed so that 34 metric tons of defense plutonium and defense plutonium materials at the Savannah River Site will be processed into mixed-oxide fuel by January 1, 2019.” 50 U.S.C.A. § 2566(a)(2)(B). The statute further provides that if the MOX Facility construction or operations fall behind schedule, then DOE/NNSA are required to provide Congress with a corrective action plan to correct the deficiencies to continue with the Project and begin removing plutonium from SRS. 50 U.S.C.A. § 2566(b), (c).

The Purpose Statute and the Anti-Deficiency Act

21. The Purpose Statute provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” 31 U.S.C.A. § 1301(a).

22. The Anti-Deficiency Act further states that “[a]n officer or employee of the United States Government” may not “make or authorize an expenditure or obligation exceeding

an amount available in an appropriation or fund for the expenditure or obligation" or "involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C.A. § 1341(a).

FACTUAL BACKGROUND

SRS and the MOX Facility Project

23. Built in the 1950s, the DOE-owned SRS "processes and stores nuclear materials in support of national defense and U.S. nuclear nonproliferation efforts" through several programs or "missions." Ex. 2, DOE Office of Environmental Management Website, *Savannah River Site*, <http://energy.gov/em/savannah-river-site> (last visited March 17, 2014). DOE identifies SRS as "a key [DOE] industrial complex responsible for environmental stewardship, environmental cleanup, waste management and disposition of nuclear materials." *Id.*

24. SRS also serves as the construction site for DOE's MOX Facility, which DOE and NNSA identify as the "cornerstone of the surplus disposition mission." Ex. 3, DOE, *SPD Supplemental EIS* factsheet (July 19, 2012). "This mission, which converts excess weapons-usable plutonium into a form that can be used in commercial nuclear power reactors, establishes SRS's vital role in plutonium management for DOE." *Id.* The MOX Facility will take surplus weapons-grade plutonium, remove impurities, and mix it with depleted uranium oxide to form MOX fuel pellets for reactor fuel assemblies that will be irradiated in commercial nuclear power reactors. *Id.*

25. To fulfill all of these missions, SRS currently employs about 11,000 workers, each of which, according to one study on the economic impact of SRS on the surrounding region, generates approximately 2.5 jobs in the local labor force market in the surrounding areas. Ex. 4, The O'Connell Ctr. for Executive Dev., Univ. of S.C., Aiken, Excerpt from *The Economic*

Impact of the Savannah River Site on Five Adjacent Counties in South Carolina and Georgia 1-2 (2011). Approximately 1,800 members of the SRS labor force work on the MOX Facility, thereby generating approximately 4,500 additional jobs in Aiken County. Ex. 5, Derrek Asberry, *MOX 101: The Past, Present, and Uncertain Future*, Aiken Standard, March 16, 2014, at 2.

26. To date, the construction of the 600,000-square-foot MOX Facility is over 60% complete, representing the efforts of over 18 million safe work hours invested in the Project. Ex. 6, *MOX Project: Important Part of the U.S. Nonproliferation Program*, <http://us.arevablog.com/category/nuclear-energy/> (Feb. 24, 2014, 5:18 p.m.). According to DOE, through September 2012, a total of 12 out of 16 buildings for the MOX Facility had been completed, and more than 128,400 cubic yards of reinforced concrete and 20,800 tons of rebar had been installed. Ex. 7, NNSA, Excerpt from *FY 2014 Budget Request* DN-112 (April 2013). In April 2013, the final layer of structural concrete was poured on the 140,000-square-foot roof of the MOX Facility, completing the exterior structure of the facility. Ex. 8, *Roof of the MOX Facility Completed*, <http://us.arevablog.com/category/press-releases/> (Apr. 4, 2013, 10:49 a.m.).

27. As of April 2013, more than \$1.8 billion in subcontracts for supplies, equipment, and services to over 1,000 businesses in 43 states had been awarded, and through Fiscal Year 2014, Congress has appropriated over \$4 billion for the MOX Facility. *Id.*; Ex. 9, DOE/NNSA, Excerpt from *FY2015 Budget Justification*, Vol. 1 (March 2014) (*FY2015 Budget Justification*).

Surplus Plutonium Disposition

28. With the end of the Cold War and the collapse of the Soviet Union, significant quantities of nuclear weapons, including large amounts of weapons grade plutonium, became surplus to the defense needs of the United States and Russia. Control of these surplus materials became an urgent U.S. foreign policy goal. Particular concern focused on plutonium from Soviet

nuclear warheads, which the United States feared posed a major nuclear weapons proliferation risk.

29. In an effort to consolidate and eventually reduce the United States' and Russia's surplus weapons-grade plutonium, the United States and Russia jointly developed a plan for the nonproliferation of weapons of mass destruction worldwide. *See Ex. 10, Excerpt from D.J. Spellman et al., History of the U.S. Weapons-Usable Plutonium Disposition Program Leading to DOE's Record of Decision 2* (1997) (detailing important events and studies concerning surplus weapons-usable plutonium disposition in United States from end of Cold War to 1997).

30. Consistent with this joint plan, in the early 1990s, the United States began exploring options for the long-term storage and the safe disposition of weapons-usable plutonium declared surplus to national security needs. *Id.*

31. On or about January 24, 1994, the then-Secretary of Energy created a DOE-wide project for the control and disposition of surplus fissile materials, which led to the creation of the Office of Fissile Materials Disposition later that year. *Id.* at 3.

32. Also in early 1994, DOE's National Laboratory and several independent experts began evaluating 37 different plutonium disposition technology options. *See Ex. 11, NNSA Report to Congress: Disposition of Surplus Defense Plutonium at Savannah River Site 2-1* (Feb. 15, 2002) (hereinafter *Report to Congress*).

33. In December 1996, DOE issued the *Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement (PEIS)* detailing its extensive evaluation of alternatives for both the long-term storage of weapons-usable fissile materials and the disposition of surplus plutonium. *See Ex. 12, DOE, Record of Decision (ROD) for PEIS* (Jan. 21, 1997), 62 Fed. Reg. 3014. For disposition, DOE's "preferred alternative"

consisted of a hybrid, or dual-path, strategy that proposed to immobilize a portion of the surplus plutonium in glass or ceramic materials and to irradiate the remaining plutonium in MOX fuel in existing domestic, commercial reactors. *Id.*

34. In January 1997, DOE officially announced its intention to pursue this hybrid plutonium disposition strategy. *Id.* According to the DOE, this strategy would entail the construction and operation of three major facilities for surplus plutonium disposition:

- A pit disassembly and conversion facility to convert surplus U.S. plutonium weapons components (pits) into an unclassified oxide form suitable for disposition and inspection.
- A MOX fuel fabrication facility to fabricate surplus plutonium oxide into MOX fuel for irradiation in existing U.S. commercial nuclear reactors.
- A plutonium immobilization plant to immobilize surplus non-pit plutonium in a ceramic material that is then surrounded by vitrified high-level radioactive waste.

Ex. 11, *Report to Congress*, at 2-1. This strategy would allow DOE to convert the surplus plutonium to forms that meet the “Spent Fuel Standard” recommended by the National Academy of Sciences by making the “material as inaccessible and unattractive for weapons use as the much larger and growing inventory of plutonium that exists in spent nuclear fuel from commercial power reactors.” *Id.*

35. In October 1998, Congress enacted the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. 105-261, 112 Stat. 1920, which gave the U.S. Nuclear Regulatory Commission (NRC) licensing authority over the construction and operation of MOX fuel fabrication and other irradiation facilities.

36. In 1999, DOE signed a contract with a consortium, now Shaw AREVA MOX Services, LLC (MOX Services), to design, build, and operate a MOX facility. *See* Ex. 13, DOE,

Excerpt from *Surplus Plutonium Disposition Final EIS (SPD EIS)*, Summary, at S-1 (Nov. 1999).

37. In November 1999, after further evaluating the alternatives for surplus plutonium disposition, DOE issued the *Surplus Plutonium Disposition Final EIS (SPD EIS)* stating that the “purpose of and need for the proposed action is to reduce the threat of nuclear weapons proliferation worldwide by conducting disposition of surplus plutonium in the United States in an environmentally safe and timely manner.” Ex. 14, DOE, Excerpt from *SPD EIS*, Vol. I – Part A, at 1-3 (Nov. 1999). DOE again concluded that the “Preferred Alternative” was the hybrid approach to immobilize a portion of the surplus weapons-grade plutonium in glass and ceramic materials and to irradiate the remaining plutonium in MOX fuel in existing domestic, commercial reactors. *Id.* at 1-10 to 1-11. DOE selected SRS as the preferred site to implement both of these approaches and upon which to construct and operate the MOX Facility. *Id.*

38. In January 2000, consistent with the conclusions in the *SPD EIS*, DOE officially decided to construct and operate the MOX Facility at SRS to fabricate MOX fuel using approximately 33 metric tons of surplus plutonium, as well as a new immobilization facility. Ex. 15, DOE, ROD for *SPD EIS* (Jan. 11, 2000), 65 Fed. Reg. 1608. DOE reasoned that pursuing this dual-track approach provided “the best opportunity for U.S. leadership in working with Russia to implement similar options for reducing Russia’s excess plutonium” and would “send the strongest possible signal to the world of U.S. determination to reduce stockpiles of surplus weapons-usable plutonium as quickly as possible and in an irreversible manner.” *Id.* at 1620. Indeed, later that year, the United States and Russia formally entered into the PMDA committing each country to the disposal of at least 34 metric tons of weapons-grade plutonium withdrawn from their respective nuclear weapons programs. Ex. 16, PMDA (Sept. 1, 2000).

39. Continuing on the path towards construction and operation of the MOX Facility, on or about February 28, 2001, MOX Services submitted a request to the NRC for a license to construct the MOX Facility at SRS. *See Ex. 17, NRC, Excerpt from Environmental Impact Statement on the Construction and Operation of a Proposed Mixed Oxide Fuel Fabrication Facility at Savannah River Site, South Carolina 1-3 (Jan. 2005) (NRC EIS).*

40. In late 2001, Congress enacted the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1378 (NDAA FY02). Section 3155 of NDAA FY02 was entitled, “Disposition of Surplus Defense Plutonium at Savannah River Site, Aiken, South Carolina” (SRS Plutonium Disposition Provisions). Therein, Congress directed DOE to provide, not later than February 1, 2002, a plan for the disposal of surplus defense plutonium located at SRS and to be shipped to SRS in the future. NDAA FY02, § 3155.

41. The SRS Plutonium Disposition Provisions also required the Secretary of Energy to:

- Consult with the Governor of South Carolina regarding “any decisions or plans of the Secretary related to the disposition of surplus defense plutonium and defense plutonium materials located at [SRS]”;
- Submit a report to the congressional defense committees providing notice for each shipment of defense plutonium and defense plutonium materials to SRS;
- If DOE decides not to proceed with construction of the immobilization facilities or the MOX Facility, prepare a plan that identifies a disposition path for all defense plutonium and defense plutonium materials; and
- Include with the budget justification materials submitted to Congress in support of DOE’s budget for each fiscal year “a report setting forth the extent to which amounts requested for the [DOE] for such fiscal year for fissile materials disposition activities will enable the [DOE] to meet commitments for the disposition of surplus defense plutonium and defense plutonium materials located at [SRS]....”

42. Consistent with its duties under the SRS Plutonium Disposition Provisions, in January 2002, DOE decided not to proceed with the immobilization portion of the hybrid

strategy, leaving the construction and operation of the MOX Facility as the only strategy to dispose of surplus plutonium in the United States. In support of its decision, DOE stated that moving to a MOX-only disposition strategy followed “an exhaustive Administration review of non-proliferation programs, including alternative technologies to dispose of surplus plutonium to meet the non-proliferation goals agreed to by the United States and Russia.” Ex. 18, DOE, Release No. PR-02-007 (Jan. 23, 2002).

43. On or about February 15, 2002, DOE/NNSA submitted its *Report to Congress: Disposition of Surplus Plutonium at Savannah River Site*. Ex. 11, *Report to Congress*. The report’s conclusions reiterated DOE’s previous announcement 3 weeks prior that it was moving to the MOX-only approach at SRS for the United States’ surplus plutonium disposition. *Id.* Advocating for the construction of the MOX Facility at SRS, the report provided an in-depth historical look at the plutonium disposition program and the myriad studies and reports conducted to find the “most advantageous option for disposition of U.S. surplus plutonium,” ultimately concluding, once again, that constructing the MOX Facility at SRS was the “preferred option.” *Id.*

44. On or about April 19, 2002, DOE amended the *PEIS* and *SPD EIS* RODs to reflect its decision to cancel the immobilization portion of the plutonium disposition strategy. Ex. 19, DOE, *Am. ROD for PEIS & SPD EIS* (April 19, 2002), 67 Fed. Reg. 19432.

45. Following the issuance of DOE/NNSA’s report, Congress enacted statutory requirements for the construction and operation of the MOX Facility by DOE. NDAA FY03, § 3182, *subsequently codified by* the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392, as 50 U.S.C.A. § 2566 (Section 2566).

46. In support of Section 2566, Congress made the following findings:

- (1) In September 2000, the United States and the Russian Federation signed a Plutonium Management and Disposition Agreement by which each agreed to dispose of 34 metric tons of weapons-grade plutonium.
- (2) The agreement with Russia is a significant step toward safeguarding nuclear materials and preventing their diversion to rogue states and terrorists.
- (3) The Department of Energy plans to dispose of 34 metric tons of weapons-grade plutonium in the United States before the end of 2019 by converting the plutonium to a mixed-oxide fuel to be used in commercial nuclear power reactors.
- (4) The Department has formulated a plan for implementing the agreement with Russia through construction of a mixed-oxide fuel fabrication facility, the so-called MOX facility, and a pit disassembly and conversion facility at the Savannah River Site, Aiken, South Carolina.
- (5) The United States and the State of South Carolina have a compelling interest in the safe, proper, and efficient operation of the plutonium disposition facilities at the Savannah River Site. The MOX facility will also be economically beneficial to the State of South Carolina, and that economic benefit will not be fully realized unless the MOX facility is built.
- (6) The State of South Carolina desires to ensure that all plutonium transferred to the State of South Carolina is stored safely; that the full benefits of the MOX facility are realized as soon as possible; and, specifically, that all defense plutonium or defense plutonium materials transferred to the Savannah River Site either be processed or be removed expeditiously.

NDAA FY03, Subtitle E, § 3181.

47. By enacting Section 2566, Congress specifically approved the MOX Facility at SRS and directed DOE to proceed with its construction and operation. *See ¶¶ 19-20 supra* (discussing DOE's obligations under Section 2566).

48. DOE/NNSA recognized its duties under Section 2566 in its 2003 Amended *SPD EIS ROD* in which it stated:

Finally, DOE/NNSA takes note of Division C, Title XXXI, Subtitle E of the recently enacted Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Pub. L. 107-314, December 2, 2002). That Subtitle, entitled “Disposition of Weapons-Usable Plutonium at Savannah River, South Carolina,” directs the Secretary to submit to Congress a plan for and series of reports regarding construction and operation of a MOX facility at SRS under a specific timetable. It also directs the Secretary to take certain actions if that schedule is not being met, which depending on the circumstance may include preparation of a corrective action plan, cessation of further transfers of weapons-usable plutonium to SRS until the Secretary certifies that the MOX production objective can be met, removal of weapons-usable plutonium transferred to SRS, and payment of economic assistance to SRS from funds available to the Secretary. *In DOE/NNSA’s view, enactment of this legislation demonstrates strong congressional interest in seeing DOE/NNSA proceed with the MOX facility as promptly as is reasonably possible, and DOE/NNSA is proceeding accordingly.*

Ex. 20, DOE, *Am. ROD for SPD EIS* (April 24, 2003) (emphasis added), 68 Fed. Reg. 20314.

49. Based on the decision to construct and operate the MOX Facility at SRS, DOE began transferring plutonium to SRS for processing into MOX fuel and, until very recently, intended to transfer additional plutonium to SRS in the future. *See, e.g.,* Ex. 21, DOE, *Storage of Surplus Plutonium Materials at the Savannah River Site Supplemental Analysis* (Sept. 5, 2007).

50. On or about March 30, 2005, after its own evaluation and analysis, NRC issued a license for construction to MOX Services. Ex. 22, NRC Construction Authorization No. CAMOX-001 (Mar. 30, 2005). NRC found that radiation exposure to the public is greater in a “no action” alternative than with the Project, noting that “continued storage would result in higher annual impacts” of public radiation exposure than implementation of the Project. Ex. 17, Excerpt from NRC EIS, at 4-96. NRC further found that:

The primary benefit of operation of the proposed MOX facility would be the resulting reduction in the supply of weapons-grade plutonium available for unauthorized use once the plutonium component of MOX fuel has been irradiated in commercial nuclear

reactors. *Converting surplus plutonium in this manner is viewed as being a safer use/disposition strategy than the continued storage of surplus plutonium at DOE sites*, as would occur under the no-action alternative, since it would reduce the number of locations where the various forms of plutonium are stored (DOE 1997). Further, converting weapons-grade plutonium into MOX fuel in the United States — as opposed to immobilizing a portion of it as DOE had previously planned to do — lays the foundation for parallel disposition of weapons-grade plutonium in Russia, which distrusts immobilization for its failure to degrade the plutonium's isotopic composition (DOE 2002a). *Converting surplus plutonium into MOX fuel is thus viewed as a better way of ensuring that weapons-usable material will not be obtained by rogue states and terrorist groups*. Implementing the proposed action is expected to promote the above nonproliferation objectives. Additionally, building and operating the proposed MOX facility is expected to result in a gain of scientific knowledge relative to the conversion of weapons-grade plutonium into reactor fuel.

In addition to the above primary benefits, there are *secondary economic benefits of the proposed action*. Impacts of construction on the regional economic area (REA) and region of influence (ROI) would be beneficial with respect to jobs and income. Direct construction jobs for the proposed action would total about 1,010 in the peak construction year. Although immigration of workers during construction would be greater for the proposed action, no adverse impacts are anticipated to public services, schools, housing availability, or the local transportation network. Construction of the proposed facilities would be expected to generate 91.9 million in total income within the REA during the peak construction year.

Id. at 2-36 (emphasis added).

51. The NRC approval of the MOX Project was based in part on the “national policy decision to reduce supplies of surplus weapons-grade plutonium, as reflected in agreements between the United States and Russia.” *Id.* at 2-39.

52. MOX Services began construction on MOX Facility on or about August 1, 2007.

53. In July 2012, after 5 years of analysis and public comment, DOE issued a Draft SPD Supplement EIS regarding its study of alternatives for additional surplus plutonium for

which a disposition pathway had not yet been chosen. Ex. 23, DOE, Excerpt from *Draft SPD Supplemental EIS* (July 2012). DOE stated that the “purpose and need for action remains, as stated in the [SPD EIS issued in 1999], to reduce the threat of nuclear weapons proliferation worldwide by conducting disposition of surplus plutonium in the United States in an environmentally sound manner, ensuring that it can never again be readily used in nuclear weapons.” *Id.* at S-2.

54. After analysis of all the alternatives, DOE once again concluded that the “MOX Fuel Alternative is DOE’s Preferred Alternative for surplus plutonium disposition.” *Id.* at S-33. DOE added that “[i]t is important that [the MOX Facility] begin operations to demonstrate progress to the Russian government, meet U.S. legislative requirements, and reduce the quantity of surplus plutonium and the concomitant cost of secure storage.” *Id.* at S-12.

55. Recent agreements by the United States and Russia also reflect these nations’ support of MOX. Effective July 13, 2011, the United States and Russia amended the PMDA, agreeing to begin plutonium disposition in 2018 and, importantly, that the MOX approach was the only option for plutonium disposition. *See* Ex. 24, PMDA, as amended by 2010 Protocol.

56. For Fiscal Year 2014, Congress appropriated at least \$343 million specifically for the “Construction” of the “Mixed oxide fuel fabrication facility, Savannah River, SC” and directed DOE to “undertake a root cause analysis that identifies the underlying causes of cost increases for the MOX and Waste Solidification Building projects and includes the identification and prioritization of recommended solutions and corrective measures.” National Defense Authorization Act for Fiscal Year 2014, Pub L. No. 113-66, 127 Stat. 672 (NDAA FY14); CAA FY14; Ex. 25, Explanatory Statement, CAA FY14 (Jan. 15, 2014). DOE was instructed to “submit a report on the results of its analysis to the Committees on Appropriations of the

House of Representatives and the Senate not later than 180 days after enactment of this Act.”

Ex. 25, Explanatory Statement.

57. In its report on the NDAA FY14, the House Committee on Armed Services directed NNSA to study potential cost savings, consider adding international partners to the program, and study “the potential for achieving greater economic efficiencies by designating additional supplies of surplus plutonium for disposition through the MOX facility.” Ex. 26, U.S. House of Representatives, *Report of the Committee on Armed Services* 343-44 (June 7, 2013). The House Committee instructed NNSA to submit the completed study to the Congressional defense committees by April 1, 2014. *Id.* The House Committee made no recommendation or suggestion that the MOX program should be discontinued or suspended.

58. In the CAA FY14, Congress placed the following limitations on DOE’s ability and authority with respect to appropriated funds, which apply to funds appropriated for the MOX Facility:

Sec. 301. (a) **No appropriation**, funds, or authority **made available by this title** for the Department of Energy **shall be used** to initiate or resume any program, project, or activity or to prepare or initiate Requests For Proposals or similar arrangements (including Requests for Quotations, Requests for Information, and Funding Opportunity Announcements) **for** a program, project, or **activity if the program, project, or activity has not been funded by Congress.**

....

(f) **None of the funds provided in this title shall be available for obligation or expenditure through a reprogramming of funds that—**

- (1) creates, initiates, or **eliminates a program, project, or activity;**
- (2) increases funds or personnel for any program, project, or activity for which funds are denied or restricted by this Act; or
- (3) **reduces funds that are directed to be used for a specific program, project, or activity** by this Act.

CAA FY14, § 301 (emphasis added).

59. Similarly, Chapter V of the DOE's "*Budget Execution – Funds Distribution and Control Manual*" issued January 9, 2006, states that "[r]eprogramming should not be employed to initiate new programs or **to change program, project, or activity allocations** specifically denied, limited or increased by Congress in appropriation acts or reports" and requires that any "[reprogramming] proposals must be submitted in advance to the [Congressional] committees and be fully explained and justified." Ex. 27, DOE, Excerpt from *Budget Execution – Funds Distribution and Control Manual* V-3 (Jan. 9, 2006) (emphasis added).

60. On or about March 4, 2014, the President released his Fiscal Year 2015 Budget Proposal and proposed funding sufficient only to place the MOX Facility in "cold standby." *See* Ex. 28, Excerpt from Office of Mgmt. & Budget, Exec. Office of the President, Budget of the United States Government, Fiscal Year 2015 (2014) (FY2015 Budget Proposal). The FY2015 Budget Proposal submitted to Congress provides:

Following a year-long review of the plutonium disposition program, the Budget provides funding to place the Mixed Oxide (MOX) Fuel Fabrication Facility in South Carolina into cold-standby. NNSA is evaluating alternative plutonium disposition technologies to MOX that will achieve a safe and secure solution more quickly and cost effectively. The Administration remains committed to the U.S.-Russia Plutonium Management and Disposition Agreement, and will work with its Russian partners to achieve the goals of the agreement in a mutually beneficial manner.

Id.

61. NNSA stated the FY2015 Budget Proposal "reflects the decision to place the MOX project in cold standby to further study more efficient options for plutonium disposition." Ex. 29, NNSA, Statement (Mar. 4, 2014).

62. Notwithstanding Congress' appropriation of funds for the construction of the MOX Facility through September 30, 2014—the end of Fiscal Year 2014—and the absence of any Congressional action in support of placing the MOX Facility in cold standby, on March 14, 2014, DOE and NNSA released Volume 1 of their “Detailed Budget Justifications – Energy and Water Development Appropriations,” which includes their “plan” to place the MOX Facility in cold standby **immediately**. Ex. 9, *FY2015 Budget Justification*. Although found in their budget justification documents for FY2015, DOE and NNSA stated the following regarding the MOX Facility for the remainder of FY2014:

During the 3rd Qtr of FY 2014, the [MOX Facility] will be placed in cold stand-by.

....

Due to the magnitude of the changes in the FY 2015 and out year funding profile, a detailed cold stand-by plan for the [MOX Facility] project will be developed, approved, and implemented in accordance with the DOE Project Management and Contract processes. This plan will present in detail the impact of placing the project in cold stand-by. ***NNSA will engage with the contracting partner to begin development and implementation of this plan in March 2014.***

....

Activities in the second half of FY 2014 [for the MOX Facility] will focus on transitioning to a cold stand-by mode.

....

A detailed plan will be developed that will address cold stand-by activities. ***Some actions, such as reduction of craft, can be done immediately.*** Other staff reductions will occur after the cold stand-by plan is developed, approved, and appropriate notifications are made.

Id. at 535, 543, 546 (emphases added).

63. DOE and NNSA also admitted that they will not meet the Congressional mandate of Section 2566:

The Department will not meet the MOX production objective as defined in P.L. 107-314, Bob Stump National Defense Authorization Act for Fiscal Year 2003, as most recently amended

by P.L. 112-239, the National Defense Authorization Act for Fiscal Year 2013....

Id. at 527.

64. On or about March 6, 2014, United States Senators Lindsey O. Graham (S.C.), Tim Scott (S.C.), Mary Landrieu (La.), Richard Burr (N.C.), Kay Hagan (N.C.), Saxby Chambliss (Ga.), and Johnny Isakson (Ga.) wrote a letter to Secretary Moniz stating:

The President's budget request funds the plutonium disposition program at a level that would place the [MOX Facility] project in cold standby. The \$221 million request is significantly lower than what is needed to maintain on-going operations and construction for [the MOX Facility], will force major layoffs, and threaten the viability of the only congressionally authorized disposition path for weapons grade plutonium. *It is our understanding that the Department of Energy (DOE) is planning to use FY2014 funds to begin this process. This would be inappropriate and we discourage this in the strongest possible terms.*

Under both the FY2014 National Defense Authorization Act and the FY2014 Consolidated Appropriations Act, funding is provided for construction activities at the MOX facility. *No funds are provided to put the program in cold standby.* While we share your concerns regarding the increased costs associated the plutonium disposition program, we are concerned that the budget request will end up adding to the costs while we still try to consider options regarding the program. As such, to not foreclose options and drive costs, it is our opinion that *construction activities continue until the Department of Energy (DOE) receives further guidance through the legislative process.*

Further, the budget submission claims the "Administration remains committed to the U.S.-Russia Plutonium Management and Disposition Agreement" We remind you that under the terms of this agreement, MOX is the only acceptable disposition path for the 34 metric tons of American weapons grade plutonium. *If the Administration does remain committed to this agreement, it does not make sense to stop construction of this facility at this time.*

Ex. 30, Ltr. to Secretary Moniz, dated March 6, 2014 (emphasis added).

65. The Defendants' proposed actions described above will adversely affect the State's "compelling interest in the safe, proper, and efficient operation of the plutonium disposition facilities at the Savannah River Site," Pub. L. No. 107-314, 116 Stat. 2458, Subtitle E, § 3181, as well as other interests of the State.

FOR A FIRST CAUSE OF ACTION
(*Ultra Vires* Action in Excess of Statutory and Constitutional Authority)

66. The relevant allegations contained in the preceding and subsequent paragraphs are reasserted and reincorporated as fully as if set forth verbatim herein, insofar as they are not inconsistent with the allegations of this cause of action.

67. The Appropriations Clause of the United States Constitution provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7.

68. Congress has appropriated over \$4 billion in funds for the MOX Facility through Fiscal Year 2014.

69. In Fiscal Year 2014, Congress appropriated at least \$343 million to be used by the Secretary of Energy and DOE for equipment design, construction, and start-up activities of the MOX Facility. No funds were appropriated for the placement of the MOX Facility in cold standby, nor did Congress contemplate such a course of action in Fiscal Year 2014.

70. Through the Fiscal Year 2015 Budget Proposal, the President proposed funding sufficient only to place the MOX Facility in cold standby, thereby recommending that the Project be indefinitely suspended in Fiscal Year 2015.

71. The President's recommendation to place the MOX Facility in cold standby in Fiscal Year 2015 has not been approved or authorized by Congress.

72. DOE and NNSA have announced their decision to place the MOX Facility in cold standby immediately—*i.e.*, in March 2014—thereby indefinitely suspending the project.

73. In order to place the MOX Facility into immediate cold standby, DOE and NNSA intend to use funds appropriated by Congress in Fiscal Year 2014 that have been directed only for construction of the MOX Facility.

74. These funds have not been authorized by Congress to be used to place the MOX Facility in cold standby.

75. The proposed actions by the DOE and NNSA to place the MOX Facility into immediate cold standby using current fiscal year funds would contravene the directives of Congress set forth in 50 U.S.C.A. § 2566, 31 U.S.C.A. §§ 1301 and 1341, NDAA FY14, and CAA FY14.

76. The use of appropriated funds in this manner is unauthorized and violates the Constitution and Federal law.

77. Any actions of the Defendants to suspend construction of the MOX Facility in Fiscal Year 2014 should be declared unlawful, and the Defendants should be enjoined from taking action in this regard, including but not limited to steps implementing any cold standby for the MOX Facility.

**FOR A SECOND CAUSE OF ACTION
(Violation of Separation of Powers)**

78. The relevant allegations contained in the preceding and subsequent paragraphs are reasserted and reincorporated as fully as if set forth verbatim herein, insofar as they are not inconsistent with the allegations of this cause of action.

79. Pursuant to Article I, section 1 of the United States Constitution, all legislative powers are vested in Congress, while pursuant to Article II, section 2, the President of the United

States is vested with the responsibility to faithfully execute laws enacted by the legislative branch.

80. As part of the NDAA FY03, subsequently codified in 50 U.S.C.A. § 2566, Congress directed the Secretary of Energy to submit a plan for the construction and operation of a MOX facility at the Savannah River Site located near Aiken, South Carolina.

81. Congress mandated that the plan submitted by the Secretary of Energy “shall include … a schedule for construction and operations so as to achieve, as of January 1, 2012, and thereafter, the MOX production objective” defined as “an average rate equivalent to not less than one metric ton of mixed-oxide fuel per year.” 50 U.S.C.A. § 2566(a)(2)(A), (h)(1).

82. Congress further required that the plan submitted by the Secretary of Energy “shall include … a schedule of operations of the MOX facility designed so that 34 metric tons of defense plutonium and defense plutonium materials at the Savannah River Site will be processed into mixed-oxide fuel by January 1, 2019.” 50 U.S.C.A. § 2566(a)(1)(B).

83. The DOE and NNSA, as executive branch agencies, must execute and follow the legislative directions of Congress, subject to their constitutionality and the appropriation of sufficient funds to carry out the contemplated activities.

84. The proposed actions by the DOE and NNSA to place the MOX Facility immediately into cold standby in Fiscal Year 2014 would violate the duties imposed upon them by Congress pursuant to 50 U.S.C.A. § 2566, NDAA FY03, NDAA FY14, and CAA FY14.

85. The proposed actions by the DOE and NNSA to place the MOX Facility into cold standby using current fiscal year funds would violate the duties imposed upon them by Congress pursuant to 31 U.S.C.A. §§ 1301 and 1341, NDAA FY14, and CAA FY14.

86. The decision whether to fund the continued construction and future operation of the MOX Facility lies with Congress.

87. By relying upon the Budget Proposal for Fiscal Year 2015 proposed by the President to justify the placement of the MOX Facility immediately into cold standby in Fiscal Year 2014, the DOE and NNSA improperly violate their existing legal mandates and obligations for the current fiscal year.

88. The DOE and NNSA, as executive branch agencies, are unilaterally using an executive branch budget *request* to establish policy in disregard and direct contravention of Congress's legislative mandates, thereby violating the separation of powers doctrine.

89. For the foregoing reasons, any actions of the DOE and NNSA to suspend construction of the MOX Facility in Fiscal Year 2014 should be declared unlawful, and the Defendants should be enjoined from taking action in this regard, including but not limited to steps implementing any cold standby for the MOX Facility.

**FOR A THIRD CAUSE OF ACTION
(Violation of 31 U.S.C.A. §§ 1301 and 1341)**

90. The relevant allegations contained in the preceding and subsequent paragraphs are reasserted and reincorporated as fully as if set forth verbatim herein, insofar as they are not inconsistent with the allegations of this cause of action.

91. 31 U.S.C.A. § 1301(a) provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”

92. 31 U.S.C.A. § 1341(a) states that “[a]n officer or employee of the United States Government” may not “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation” or “involve [the]

government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”

93. Congress has not appropriated or made available funds in the current fiscal year to place the MOX Facility in cold standby.

94. The Secretary of Energy and the Administrator’s decision to place the MOX Facility in cold standby and necessarily expend funds in fiscal year 2014 to do so is a violation of 31 U.S.C.A. §§ 1301 and 1341 because any implementation of cold standby would necessarily involve the expenditure of funds for which no appropriation or authorization currently exists.

95. The Secretary of Energy and the Administrator’s decision to authorize the expenditure of funds in Fiscal Year 2014 to place the MOX Facility immediately in cold standby therefore is unlawful and is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and is “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C.A. § 706(2)(A) & (C).

**FOR A FOURTH CAUSE OF ACTION
(Violation of 50 U.S.C.A. § 2566)**

96. The relevant allegations contained in the preceding and subsequent paragraphs are reasserted and reincorporated as fully as if set forth verbatim herein, insofar as they are not inconsistent with the allegations of this cause of action.

97. Section 2566 is the Congressional mandate for the “construction and operation of [the MOX Facility].”

98. Section 2566 was enacted to codify the commitments of the United States and DOE to the State of South Carolina that while plutonium may be placed in South Carolina, such placement was not final disposition for long-term storage of plutonium in the State, but rather a temporary storage to implement the disposition method of MOX processing in the MOX Facility.

Specifically, NNSA recognized in 2002 that “[s]torage in place undercuts existing commitments to the states, particularly South Carolina, which is counting on disposition as a means to avoid becoming a permanent ‘dumping ground’ for surplus weapons-grade plutonium by providing a pathway out of the site for plutonium brought there for disposition.” Ex. 11, *Report to Congress* 5-2.

99. The decision by the Defendants to place the MOX Facility into cold standby and their actions putting that decision into effect are a violation and abandonment of the mandatory duty imposed upon them by Congress pursuant to Section 2566.

100. The Defendants cannot indefinitely suspend construction of the MOX Facility, including but not limited to the means of cold standby, while funds are appropriated and available unless and until an alternative disposal method is identified and approved.

101. On information and belief, neither DOE or NNSA has identified a reasonable and viable alternative to the MOX Facility nor received any Congressional approval of such alternative disposal methods nor complied with other applicable laws for identification, analysis, and selection of an alternative disposal method of the surplus plutonium to comply with the commitments, duties, obligations, and requirements to dispose of the surplus plutonium and remove such plutonium from the State of South Carolina.

102. The Defendants’ decision and actions therefore are unlawful and constitute agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and is “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C.A. § 706(2)(A) & (C).

PRAYER FOR RELIEF

A. South Carolina is entitled to a declaration and order that DOE and NNSA's proposed action to place the MOX Facility in cold standby in Fiscal Year 2014 is a violation of the Constitution;

B. South Carolina is entitled to a declaration and order that DOE and NNSA's proposed action to expend funds to place the MOX Facility in cold standby in Fiscal Year 2014 is a violation of 31 U.S.C.A. §§ 1301 and 1341.

C. South Carolina is entitled to a declaration and order that DOE and NNSA's proposed action to place the MOX Facility in cold standby in Fiscal Year 2014 is a violation of the Congressional mandate under 50 U.S.C.A. § 2566 to continue construction of the MOX Facility;

D. South Carolina is entitled to a declaration and order that DOE and NNSA at this point in time must continue to move forward with the MOX Facility in compliance with the Constitution and statutory law;

E. South Carolina is entitled to a declaration and order enjoining DOE and NNSA's proposed action to place the MOX Facility in cold standby in Fiscal Year 2014 and requiring DOE and NNSA to maintain the *status quo* in continuing construction of the MOX Facility in Fiscal Year 2014 pursuant to Congressional and budgeting mandates, duties, and obligations.

F. South Carolina is entitled to such other relief as the Court may deem just and proper.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

s/Alan Wilson

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